In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-860

WARNER PRESS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 525 F.2d 190. The decision and order of the National Labor Relations Board (J. A. 91-101)[1] are reported at 215 NLRB No. 10. The Board's decision in the underlying representation proceeding (J.A. 88-90) is unreported.

JURISDICTION

The decision of the court of appeals enforcing the Board's order was entered on October 31, 1975 (Pet.

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[1]"J.A." refers to the joint appendix filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

App. 1a-12a).[2] The petition for a writ of certiorari was filed on December 18, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly rejected the Company's contention that, during a representation election campaign, the Union misrepresented its policy regarding initiation fees and its authority to fine members.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.),* are set forth at Pet. App. 15a-16a.

STATEMENT

The Union[3] filed a petition for an election among the Company's production and maintenance workers. The election was held, and the Union won by a vote of 86 to 75 (J.A. 3-4). The Company filed objections to the election, but the Board overruled the objections and certified the Union (J.A. 3-13, 88-90). The Company refused to bargain with the Union and, in the subsequent unfair labor practice proceeding, it reiterated its objections to the election. The Board found that the Company had violated Section 8(a)(5) and (1) of the Act by its refusal to bargain, and it issued a bar-

[2]The formal judgment submitted by the Board (Pet. App. 13a-14a) has not yet been entered, because, on November 19, 1975, petitioner obtained a stay pending the filing and disposition of the petition.

[3]Indianapolis Printing Pressman, Assistants and Offset Workers Union No. 17.

gaining order (J.A. 91-101). The court of appeals enforced the order.

During the election campaign, Union agents assured employees that the Union's customary initiation fee would not be required of employees currently working at the Company (J.A. 5-8). The Union also distributed several leaflets which stated that "[t]here will never be any initiation fees for us who now work at Warner Press" (J.A. 20, 23, 30). One leaflet explained that the Union "not only can waive initiation fees * * * but it already has"; that use of such waivers "for newly organized members is a long standing and perfectly legal policy of our Union"; and that "[s]uch fees have been waived all over the United States and Canada * * * and, they will be waived here at Warner Press too" (J.A. 30). In a letter sent to all employees three days before the election, the Union's president "guarantee[d] that there will *never* be any initiation fees paid to [the Union] by employees of Warner Press who are on the company Payroll at the time that the first Union Contract is signed" (J.A. 25; emphasis in original). The Company contended that the Union's pre-election promise to waive initiation fees was contrary to the Union's constitution, which provides for payment of an initiation fee and makes no express provision for its waiver (J.A. 9, 64).

Another Union leaflet, distributed eleven days before the election, assured the employees that "[t]here will not be any fines that we do not vote to impose" (J.A. 23). Pointing to a provision in the Union's bylaws which allows a committee of the Union—rather than the membership, as suggested in the leaflet—to impose a

fine on a nonappearing member, the Company contended that this leaflet misrepresented the procedures by which the Union imposed fines (J.A. 10-11).[4]

The Regional Director, whose findings the Board adopted rejected both of the Company's claims of misrepresentation. He pointed out that the offer to waive initiation fees was not a "statement of fact as to the contents of the union's constitution and by laws, but appears to be a guaranty that the recipient will not be required to pay initiation fees" (J.A. 9). He added that, while "this guarantee lacks support in the organizational constitution and by laws * * *, [s]uch waivers of financial obligations of a Union's constitution and by laws are traditionally made and traditionally honored and no evidence has been proferred that [the Union] will dishonor the waiver of initiation fees" (*ibid.*). The Director further found that the Union leaflet statement concerning fines was in response to "preceding Employer propaganda" (J.A. 10-11, 45) and "came at such a time in the campaign that the Employer had more than ample time to make further reply had it chosen to so do" (J.A. 11).

In enforcing the Board's order, the court of appeals held (Pet. App. 5a) that the provisions of the Union's constitution relied upon by the Company in support of its assertion that the waiver offer was a misrepresentation—

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[4]Article V, Section 16 of the by laws states (J.A. 71):

> A member who shall fail to appear before the Union, or any of its authorized committees, when properly notified to do so, shall be fined not less than five dollars ($5.00) nor more than ten dollars ($10.00) as recommended by the respective committees or by the Union.

> do not prohibit the Union from unilaterally waiving the initiation fees. Those provisions merely specify certain requirements for membership. In no way do they restrict the Union from modifying or waiving certain requirements. We cannot say that, when faced with an absence of express language in its governing documents on the point, a union may not choose to perform an act that is not prohibited by those documents.

With respect to the alleged misrepresentation concerning fines, the court relied upon the principle that (Pet. App. 8a) "[o]nly those misrepresentations which are material, made at a time which prevents effective reply, and are of a fact within the special knowledge of the party making it require an election be set aside." Since the Company had "more than ample time to effectively respond and offer its interpretation of the Union's fining procedure," the statement was not grounds for setting aside the election (*id.* at 8a-9a).

ARGUMENT

The question raised in the petition—whether a representation election should be set aside where immediately prior thereto a union misrepresented its constitution and bylaws (Pet. 2, 6-7)—is not presented on this record. Both the Board and the court of appeals rejected the Company's contention that the Union's offer to waive initiation fees was a misrepresentation and found that, even if the Union's statement concerning its fining power was misleading, the Company had ample opportunity to respond to the statement.[5] The only issue

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[5]Under settled principles, a misrepresentation that the other party has adequate opportunity to answer does not constitute grounds for setting aside an election. See *Celanese Corporation of America* v. *National Labor Relations Board*, 291 F.2d 224, 226 (C.A. 7); *Hollywood Ceramics Company, Inc.*, 140 NLRB 221, 223.

actually raised by the petition therefore is whether those determinations were correct. Such an issue raises only factual questions which do not warrant review by this Court.[6]

In any event, the Board's factual determinations are supported by substantial evidence and its conclusions are correct. The Company had well over a week to respond to the Union's statement concerning its fining powers, and the Company therefore could have corrected the possible misleading nature of the leaflet statement. Moreover, the Company offered no support for its assertion that the Union would not make good on its offer to waive initiation fees except its view that, since the Union's constitution did not expressly provide for such a waiver, it must be deemed to preclude one. The court of appeals properly rejected this assertion.[7]

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[6] *National Labor Relations Board* v. *Winchell Processing Corp.*, 451 F.2d 306 (C.A. 9), and *S.H. Kress & Co.* v. *National Labor Relations Board*, 430 F. 2d 1234 (C.A. 5), on which petitioner relies for its assertion of a conflict among the circuits (Pet. 7), are distinguishable. In both of those cases the courts found that the objectionable statements were actually misrepresentations, to which the employers had no opportunity to reply. *Winchell, supra*, 451 F.2d at 308-309; *S.H. Kress, supra*, 430 F.2d at 1238-1239.

[7] The court stated (Pet. App. 5a, n. 2):

> We do not agree with the Company's contention that the Union's constitution and by-laws "expressly forbid" the waiving of initiation fees. Our examination of the constitutional provisions included in the record discloses no such "express" prohibition. Implicit in the Company's argument is the assertion that since the constitution does not "expressly" *permit* waiver, it necessarily must "expressly" *forbid* waiver. We do not agree with this type of reasoning. For this to be true, the Union's

The Company's attempt to buttress its argument by reference to the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 519, 29 U.S.C. 401, *et seq.*, is wide of the mark. Even assuming, as the Company contends (Pet. 8-11), that the intent of the reporting provisions of that Act was to inform employees about the provisions of their Union's constitution, so that they could receive the benefits and protections accorded therein, it does not follow that the LMRDA was intended to prohibit a union from waiving, for the employees' benefit, obligations contained in its constitution.[8]

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constitution and by-laws must have been designed to create the Union as an organization of limited, enumerated powers. However, the portions of the Union's constitution presented in the record do not give rise to such a characterization. The Company has the burden here to demonstrate that the Union's constitution and by-laws make the Union a "creature" of enumerated powers. It has failed to carry that burden.

[8]Since, as shown, the Board's decision here does not contravene any federal policy, *National Labor Relations Board* v. *Mansion House Center Management Corp.* 473 F.29 471 (C.A. 8), upon which petitioner relies (Pet. 9), is inapposite. In *Mansion House*, there was a substantial claim that a Board bargaining order would have contravened the federal Constitution by aiding a union which maintained racially discriminatory membership practices. No comparable federal policy is implicated here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1976.